Supreme Court, U.S.
FILED

No. _____ 06-650 NOV 3 - 2006

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AIRMAN FIRST CLASS MICHAEL P. JENKINS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

MARK R. STRICKLAND
LT. COLONEL, U.S. AIR FORCE
Counsel of Record

JOHN S. FREDLAND
CAPTAIN, U.S. AIR FORCE
Counsel for Petitioner

APPELLATE DEFENSE DIVISION
AIR FORCE LEGAL OPERATIONS AGENCY
112 LUKE AVENUE, SUITE 343
BOLLING AFB, DC 20332-8000
(202) 767-1562

November 2006

QUESTION PRESENTED

Whether the military judge's interpretation of Military Rule of Evidence 513 as allowing the government to use the petitioner's confidential communications in a mental health evaluation as sentencing evidence against him violated the Due Process Clause of the Fifth Amendment and this Court's recognition of a psychotherapist-patient privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1996).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 15

APPENDIX A
Opinion of the United States Court of Appeals for the Armed Forces. (9 August 2006) 1a

APPENDIX B
Opinion of the United States Air Force Court of Criminal Appeals (16 August 2005) 17a

TABLE OF AUTHORITIES

Page

Constitutional Provisions

5th Amendment 1-2,4,15

Decisions of the Supreme Court of the United States

Jaffee v. Redmond, 518 U.S. 1 (1996) 4,14-16

Middendorf v. Henry, 425 U.S. 25, 44 (1976) 14

Weiss v. United States, 510 U.S. 163 (1994) 14-15

Military Court Decisions

United States v. Rodriguez, 54 M.J. 156, 160 (2000) ... 14

Federal Statutes

10 U.S.C. § 836(a) 2,14

Military Rules of Evidence

Mil. R. Evid. 513 2-4,6,9,13-15

Miscellaneous

Manual for Courts-Martial, United States (2005 ed.)..... 14

The petitioner, Airman First Class Michael P. Jenkins, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on August 9, 2006.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Jenkins*, 63 M.J. 426 (C.A.A.F. 2006), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals, *United States v. Jenkins*, ACM 35699, 2005 CCA LEXIS 275 (A.F. Ct. Crim. App. 16 August 2005) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on August 9, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution states that "No person

shall...be deprived of life, liberty, or property, without due process of law."

Article 36, Uniform Code of Military Justice (UCMJ) Section 836(a) of Title 10, United States Code [hereinafter Article 36], provides:

...trial...procedures, including modes of proof, for cases arising under this chapter triable in courts-martial... may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts....

Mil. R. Evid. 513 states:

(a) General rule of privilege: A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist...in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) Definitions. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license and credentials.

...

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist...or patient records that pertain to communications by a patient to a psychotherapist...for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who may claim the privilege.* The privilege may be claimed by the patient....

(d) *Exceptions.* There is no privilege under this rule:

...

(4) when a psychotherapist...believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

...

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission....

STATEMENT OF THE CASE

This case presents the question of whether the military judge's interpretation of Military Rule of Evidence 513 as allowing the government to use the petitioner's confidential communications in a mental health evaluation as sentencing evidence against him violated the Due Process Clause of the Fifth Amendment and this Court's recognition of a psychotherapist-patient privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1996). The Court of Appeals for the Armed Forces affirmed the military judge's ruling, even though a) the prosecution had failed to demonstrate that the petitioner posed a

specific threat to a particular person, property item or item of classified information and b) over two months elapsed between the mental health evaluation and the petitioner's court-martial.

1. Facts

The petitioner was tried by a General Court-Martial of a military judge sitting alone and found guilty, pursuant to his pleas, of two counts of use of cocaine, one count of use of marijuana, and three counts of communicating a threat. The military judge sentence him to a bad conduct discharge, 30 months of confinement, forfeiture of all pay and allowances and reduction to the lowest pay grade. *See* R. 171. A pretrial agreement limited the confinement portion of his sentence to 18 months. *See* App. Ex. V.

The petitioner's conduct on 7 and 8 May 2003 caused his commander to request a commander-directed psychological examination. *See* R. 120. Lieutenant Colonel Frank Budd, a clinical psychologist, examined petitioner on 9 May 2003. *See id.* The examination, which lasted for almost an hour, consisted of standard forms, a clinical interview and various psychological tests. *See* R. 115, 123.

Afterwards, Lt Col Budd completed a written mental health evaluation. *See* R. 115. According to the evaluation, Lt Col Budd diagnosed the petitioner with Adult Antisocial Behavior (Axis I) and Antisocial

personality features (Axis II). *See* Pros. Ex. 12, para. 5. The evaluation further stated that the petitioner's mental health condition "is not amenable to treatment in the military setting." *Id.*, para. 6.

Lt Col Budd's written evaluation made no mention of the petitioner's expressing a desire to harm any particular individual or individuals, or military personnel or entities in general; the psychologist described the petitioner's expressions of anger in general terms. While the evaluation included the alleged statements that became the basis for two of the counts of the charge for communicating a threat, it is clear that the petitioner did not express those sentiments to Lt Col Budd. *See id.*, para. 4. Instead, the psychologist indicated that the petitioner "appeared not to know what [Lt Col Budd] was talking about" when asked about those statements. *Id.*

2. Proceedings Below

At trial on 23 July 2003, the prosecution offered Lt Col Budd's written evaluation as a sentencing exhibit. *See* R. 55. Defense counsel objected to the exhibit and any potential testimony from Lt Col Budd; the rationale was that this evidence would violate Military Rules of Evidence (Mil. R. Evid.) 513, 401, and 403. *See* R. 55-57. Trial counsel noted that Mil. R. Evid. 513's exceptions permitted the prosecution to use the evidence. *See* R. 57-60.

After trial counsel's response, the military judge and the defense counsel had this exchange:

> MJ: Defense, let me ask a question. The government is making an argument that the relevance of this testimony and Prosecution Exhibit 12 for identification would go to future dangerousness. Although the government did not say that, I am assuming that would go into whether this court should adjudge some type of discharge; bad conduct or dishonorable discharge. How would you respond to that?
>
> DC: I would say simply that the psychologist's basic, I guess, conclusions about the appropriateness of a punitive discharge simply are not within the realm of his proper diagnosis or speculation. That's a matter for the trier of fact in the sentencing portion of the trial to determine a legal conclusion such as that, and not appropriate for the psychotherapist to be making back at a time when he's evaluating this member for potential endangerment to himself or others at that time.
>
> MJ: That's not what I'm saying. I'm saying, if I'm interpreting their

argument correctly, they're saying that the court, in determining an appropriate sentence, should consider the conclusions of this doctor in making a determination of whether a punitive discharge is appropriate or not. I wanted to hear your response to that.

You're saying, from your argument, that the doctor's legal conclusion should not be considered. I'm not saying that. I'm saying, should his conclusion be considered by me in determining whether a discharge is appropriate in this case?

DC: No, Your Honor, it should not be because, again, his determinations were made looking at this from a perspective of what is the potential for danger to the accused or others at the time. His conclusions, his probing, his analysis, his meeting with the accused was geared simply towards that conclusion at that time. It wasn't, I guess, a consideration that he was contemplating later on down the road. Therefore, it lacks relevance, the probative value is highly prejudicial, and it should not be considered by the court.

R. 61-62. When the military judge asked trial counsel for any additional comments, trial counsel stated:

> Briefly, Your Honor. A bad conduct discharge, under [Rule for Courts-Martial] 1003(b)(8)(C), can be adjudged. It's designed as a punishment for bad conduct rather than as a punishment for serious offenses of either a civilian or military nature. What Dr. Budd can offer to us in that will help the court understand the nature of the conduct of this individual during his service from his testing and analysis of the individual, what sort of individual have we been dealing with while he's been in service and potentially in the future.

R. 62.

The military judge then ruled in favor of the prosecution:

> As to the testimony of Dr. Budd on this issue...the court will allow the testimony of the doctor on this *particular issue*, finding that it is relevant and finding that the psychotherapist/patient privilege does not apply given the exceptions that are indicated in 513(d)(4) and (6). For

> the same reasons, the court is going to, when offered, admit—unless there is another objection that would be made at the appropriate time, the court would admit Prosecution Exhibit 12 for identification, finding that the psychotherapist/patient privilege does not apply under the circumstances and that the document would be relevant for the court's consideration of the sentence in this case. As to any 403 issues, the court does not find that the prejudicial impact outweighs the probative value. Therefore, the defense objection to that document will be overruled. It should be renewed at the appropriate time.

R. 62-63 (emphasis added).

Before the prosecution called Lt Col Budd as a sentencing witness, defense counsel renewed the objection to the mental health evaluation and Lt Col Budd's testimony. *See* R. 112. The military judge overruled the defense objections "for the reasons previously indicated" and admitted the mental health evaluation as Prosecution Exhibit 12. *See id.* The military judge did not make any additional findings of fact or conclusions of law.

During sentencing, Lt Col Budd testified that the petitioner had higher levels of anger and hostility than an

average person. *See* R. 116. The testing had showed that the petitioner felt that rules and social norms did not apply to him. *See* R. 117. Lt Col Budd stated that the petitioner believed that, "if he was angry, then other people deserve to be punished and he would be able to take things into his own hands." *Id.* According to Lt Col Budd, testing indicated that the petitioner was "extremely impulsive, angry, likely to think angry things, likely to do angry things, and his ability to control his own emotions, his own reactions is extremely low." R. 118.

Lt Col Budd testified that most people who use drugs and alcohol suppress information about their lifestyle, but that the petitioner had been willing to discuss his substance history. *See* R. 119. He indicated that the petitioner had reported that he had a history of violence. *See id.* Lt Col Budd stated that the petitioner was "vague and evasive, which fit the pattern of some who look like they have something to hide," but credited the petitioner with "volunteering things about his history, about the violence, and [being] very forthcoming with that information." R. 120.

Trial counsel asked Lt Col Budd for his opinion of the petitioner's potential for future misconduct. *See* R. 122. Lt Col Budd stated, "I *think* he's still prone to violence. There's always a *possibility* there. In this case, with his history and his personality style, the likelihood that he would commit further violence is relatively high." *Id.* (emphasis added). Lt Col Budd

testified that he formed his opinion about the petitioner because the examination had indicated that violence was part of "[the petitioner's] personality" and "that's who he is." *Id.* Lt Col Budd stated that the tests he performed were not "a situational measure but more of a measure of the personality of the individual." R. 127.

When trial counsel asked about the threat that the petitioner posed to the general population if he were allowed to "just wander among us right now," Lt Col Budd stated,

> Since he has a short temper and little things like people wiggling their foot tend to send him off, it would be likely that he would get involved in at least verbal arguments, possibly pushing and shoving. If he was under the influence of substances, that could lead to actual violence. Those would be some of the things I would *speculate* on. Moody, he's probably be [sic] a very angry driver."

R. 128 (emphasis added). Subsequently, trial counsel showed Lt Col Budd the knife that the petitioner had used for the assault offenses and asked whether anything would preclude the petitioner from using a weapon of that sort against someone; Lt Col Budd stated, "I think it's certainly within his capability." *Id.*

Finally, Lt Col Budd testified that the petitioner could not be treated in an Air Force setting and would require "extensive, prolonged medical treatment, psychiatric treatment." R. 129. He stated that it was his job "to let commanders know when individuals should be discharged when their chance of rehabilitation is very poor, as I believe it is in Airman Jenkins [sic] case." R. 130.

Trial counsel made several references to Lt Col Budd's testimony during his sentencing argument. *See* R. 150, 152, 168. Specifically, trial counsel argued that the petitioner acted as if social norms did not apply to him, and that the petitioner could not be treated by the Air Force for his personality disorders. *See* R. 149, 151-52, 154. Aside from the findings of guilty from the petitioner's court-martial, the record of trial contains no documented history of violence or loss of temper.

Both the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces concluded that the military judge had applied Mil. R. Evid. 513 correctly by admitting Lt Col Budd's report and testimony.

REASONS FOR GRANTING THE WRIT

This Court has ruled that not every due process protection must be transplanted into the military setting; the test is "whether the factors militating in favor of [a given due process safeguard] are so extraordinarily

weighty as to overcome the balance struck by Congress." *Weiss v. United States*, 510 U.S. 163, 178 (1994) (citing *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)). In *Jaffee v. Redmond*, 518 U.S. 1, 7 (1996), this Court found "significant public and private interests" in favor of recognizing a patient-psychotherapist privilege in the federal courts. Specifically, this Court noted that "[e]ffective psychotherapy...depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Id.* at 10. The Court also observed that "[i]f the [psychotherapist-patient] privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, *particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation.*" *Id.* at 11-12 (emphasis added).

In response, the President used his powers under Article 36 to promulgate Mil. R. Evid. 513 in 1999. *See United States v. Rodriguez*, 54 M.J. 156, 160 (2000). The Drafters' Analysis indicated that Mil. R. Evid. 513 sought to strike a balance between the "social benefit of confidential counseling" recognized by this Court in *Jaffee* and "the needs of commanders for knowledge of certain types of information affecting the military." Drafters' Analysis, *Manual for Courts-Martial, United States* (*MCM*), A22-44 (2005 ed.).

The petitioner's case represents the first attempt by the military appellate system to apply Mil. R. Evid. 513. As applied, the rule effectively eviscerated the privilege. The prosecution used the petitioner's statements against him to achieve a harsher sentence, even though a) the prosecution had failed to demonstrate that the petitioner posed a specific threat to a particular person, property item or item of classified information and b) over two months elapsed between the mental health evaluation and the petitioner's court-martial.

As this Court observed in *Weiss*, civilian due process protections are required in courts-martial only when "extraordinarily weighty" concerns are present. This Court's characterization of the psychotherapist-patient privilege in *Jaffee* indicates that it does qualify as such a concern. Consequently, due process requires that military courts interpret Mil. R. Evid. 513 as being consistent with *Jaffee*. In petitioner's case, the military judge's application of the rule failed to meet that standard – and led to the petitioner being sentenced for a personality disorder that Lt Col Budd had diagnosed based on confidential communications, not just the charged offenses.

CONCLUSION

The prosecution's use of the petitioner's statements and Lt Col Budd's report and testimony as sentencing evidence violated the Due Process Clause of the Fifth Amendment and this Court's recognition of a

psychotherapist-patient privilege in *Jaffee*. He therefore respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

MARK R. STRICKLAND
LT. COLONEL, U.S. AIR FORCE
Counsel of Record

JOHN S. FREDLAND
CAPTAIN, U.S. AIR FORCE
Counsel for Petitioner

Appellate Defense Division
Air Force Legal Operations Agency
112 Luke Avenue, Suite 343
Bolling AFB, DC 20332-8000
(202) 767-1562

November 2006

Appendix A

UNITED STATES, Appellee

v.

Michael P. JENKINS,
Airman First Class U.S. Air Force,
Appellant

No. 06-0027
Crim. App. No. 35699

United States Court of Appeals for the Armed Forces

Argued May 2, 2006
Decided August 9, 2006

BAKER, J., delivered the opinion of the Court, in which GIERKE, C.J., and CRAWFORD, EFFRON, and ERDMANN, JJ., joined.

Counsel

For Appellant: Captain John S. Fredland (argued); Lieutenant Colonel Mark R. Strickland (on brief).

For Appellee: Captain Kimani R. Eason (argued); Lieutenant Colonel Robert V. Combs, Lieutenant

Colonel Gary F. Spencer, and Captain Jefferson E. McBride (on brief).

Military Judge: Daryl E. Trawick

Judge BAKER delivered the opinion of the Court.

Appellant was an Airman First Class assigned to Charleston Air Force Base, South Carolina. Before a general court-martial composed of a military judge sitting alone, Appellant pleaded guilty to two specifications of wrongful use of cocaine on divers occasions, one specification of wrongful use of marijuana, one specification of assault with a deadly weapon, one specification of disorderly conduct, and two specifications of communicating a threat, in violation of Articles 112a, 128, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 912a, 928, 934 (2000). The military judge sentenced Appellant to thirty months of confinement, reduction to E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority disapproved all confinement in excess of eighteen months and waived automatic forfeitures. The United States Air Force Court of Criminal Appeals affirmed. United States v. Jenkins, No. ACM 35699, 2005 CCA LEXIS 275, at *9, 2005 WL 2130216, at *3-*4 (A.F. Ct. Crim. App. Aug. 16, 2005) (unpublished). Upon Appellant's petition, we granted review of the following issue:

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING APPELLANT'S CONFIDENTIAL COMMUNICATIONS WITH A PSYCHOLOGIST DURING A COMMANDER-DIRECTED MENTAL HEALTH EVALUATION.

We conclude that Appellant's communications fell within exceptions (4) and (6) to the psychotherapist-patient privilege under Military Rule of Evidence (M.R.E.) 513(d), and we affirm the decision of the Air Force Court of Criminal Appeals.

BACKGROUND

At the time of his offenses, Appellant worked on the wash and wax detail at the Charleston Air Force Base Vehicle Operations. Appellant had previously been assigned to pickup and delivery, but was reassigned after an investigation into his illegal drug use. On January 10, 2003, Appellant provided a signed and sworn statement admitting that he purchased and used cocaine approximately sixty times while attending technical school at Fort Leonard Wood, Missouri, and used cocaine upwards of sixty times since his arrival at Charleston Air Force Base. On April 7, 2003, Appellant tested

positive for cocaine use during a random unit urinalysis inspection.

On the night of May 7, 2003, Appellant was drinking with friends while outside of his dorm. Airman Brandon M. Times walked by en route to his car and was confronted with racist remarks from Appellant's friends. After being approached in a hostile manner by Appellant and four of his cohorts, Airman Times quickly drove away but soon returned to the scene with three of his own friends in search of "[s]ome kind of resolution."

Airman Times and his friends approached the group and were confronted by Appellant who, while brandishing a fourteen-inch long knife, stated: "Y'all n****** are f****** with a crazy white boy tonight. I'm going to kill y'all n****** tonight," or words to that effect. Upon seeing the knife, Airman Times and his friends immediately fled the scene by foot. Appellant chased in hot pursuit, coming within feet of his target until Airman Times eventually escaped into the chow hall, therein finding safety and the assistance of Security Forces personnel who happened to be dining at the time. Security Forces personnel apprehended Appellant outside the chow hall.

Appellant was released by Security Forces the following morning on May 8, 2003, and instructed to walk home by Master Sergeant (MSgt) Janet

Osborne. At approximately 7:15 a.m., Appellant arrived at work. He described the events of the previous evening to his supervisors and coworkers, and speaking of MSgt Osborne, he stated, "That f****** bitch made me mad. She f****** made me walk home, and I was f****** drunk. If I had a f****** knife at that time, I would have cut her f****** throat," or words to that effect.

Appellant's behavior was reported up the chain of command, and on May 9, 2003, he was sent for a command-directed mental health examination with Lieutenant Colonel Frank Budd, a clinical psychologist. The examination lasted about one hour and consisted of a clinical interview, a description of Appellant's mental health history, and various psychological tests. Dr. Budd drafted a mental health evaluation following the examination.

At Appellant's court-martial, the Government gave notice that it intended to call Dr. Budd to testify on sentencing and that it would offer Appellant's mental health evaluation into evidence. Appellant objected to Dr. Budd's expected testimony and to admission of the evaluation, arguing that the probative value of the evidence was outweighed by its prejudicial impact, and also that his communications to Dr. Budd were confidential and protected by the psychotherapist-patient privilege under M.R.E. 513(a).

The military judge overruled the defense objections and held that the evidence was admissible under M.R.E. 513(d)(4) and (6) for consideration on sentencing. Trial counsel subsequently introduced the mental health evaluation, and Dr. Budd testified to his observations of Appellant during the mental health examination.

Dr. Budd testified that Appellant "acts with very poor impulse control." He also testified that Appellant scored extremely high on the anger inventory, "higher than [Dr. Budd had] ever seen," but "low and below the cutoff for the average individual" on the self-control inventory. He stated that Appellant was "extremely impulsive, angry, likely to think angry things, likely to do angry things, and his ability to control his own emotions, his own reactions is extremely low . . . if he thinks it, he will do it."

Dr. Budd's written mental health evaluation noted Appellant's involvement in nine to ten fights in high school and his arrest since joining the Air Force for fighting while on leave. The evaluation ultimately recommended that Appellant, "be ordered into confinement pending the outcome of his Courts Martial [sic] due to his dangerousness to others. His condition is not amenable to treatment in the military setting." Dr. Budd also recommended that Appellant receive extensive medical and psychiatric treatment.

Appellant now renews his argument that the military judge abused his discretion in admitting Dr. Budd's testimony and the mental health evaluation on sentencing. He contends that his communications to Dr. Budd were made to facilitate treatment or diagnosis of his mental condition and were therefore protected under the psychotherapist-patient privilege.

DISCUSSION

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000).

M.R.E. 513(a) sets forth the general rule of the psychotherapist-patient privilege:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

M.R.E. 513(b)(4) defines a "confidential communication" as one "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication."

M.R.E. 513(d) establishes eight specific exceptions to the general psychotherapist-patient privilege, two of which are implicated in this case. M.R.E. 513(d)(4) states there is no privilege when a psychotherapist "believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient." M.R.E.(d)(6) further provides there is no privilege "when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission."

Confidentiality

The Government contends that Appellant's communications to Dr. Budd were not protected by the psychotherapist patient privilege because the communications were not confidential. It argues Appellant was ordered to undergo a mental evaluation by his commander, and the purpose of the evaluation was not to facilitate treatment, but to

decide pretrial confinement matters and whether Appellant was a danger to himself or to others. In the alternative, the Government suggests that because Appellant knew that his commander, a third party, intended to review the evaluation, Appellant could not reasonably expect Dr. Budd to treat the communications as confidential.

Air Force Instruction 44-109 "establishes rules for confidentiality" and "defines conditions requiring communication between mental health providers and commanders." Dep't of the Air Force, Instr. 44-109, Mental Health, Confidentiality, and Military Law (Mar. 1, 2000) [hereinafter AFI 44-109].[1] AFI 44-109 suggests that communications to a therapist retain their confidential character, even though the communications may be disclosed to a third party, including a commander, if the commander has a

---

[1] AFI 44-109 para. 2.1 states that:

> [c]ommunications between a patient and a psychotherapist . . . made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition are confidential communications and shall be protected from unauthorized disclosure. However, confidential communications will be disclosed to persons or agencies with a proper and legitimate need for the information and who are authorized by law or regulation to receive it, unless the evidentiary privilege . . . applies.

legitimate need for the information and is authorized by law or regulation to receive the communications. Attachment 2 to AFI 44-109 is a "Mental Health Clinic Client Information Sheet," described as a consent form in the regulation, which is provided to patients prior to receiving treatment. It informs a patient that "[y]our provider will treat you as a responsible individual and will expect you take an active part in your treatment. . . . Generally, information discussed during the evaluation and treatment sessions is confidential . . . ." The document discusses only "treatment," and does not distinguish between evaluations to decide pretrial confinement matters and evaluations to facilitate treatment. The form also states the following:

> Commanders may obtain access to the records of their members to ensure fitness for duty or a client's record when the contents of mental health records are essential to the accomplishment of a military mission....Providers must take steps to protect individuals from harm when the client presents a serious threat to the life or safety of self or others.

The form does not indicate what effect, if any, disclosure for these purposes has on the confidentiality of communications for other

purposes. On Appellant's mental health evaluation, Dr. Budd wrote that he followed procedures outlined in AFI 44-109 when conducting the evaluation. Under these procedures, Appellant should have received a copy of the consent form or a modified version prior to initiating his mental health evaluation. However, the record does not indicate whether or not he did, and thus we do no know what in fact Appellant was advised of regarding the confidentiality of his communications.

In this context, we need not ultimately determine the meaning of AFI 44-109 in order to address the Government's argument that Appellant's statements were not confidential. Given Dr. Budd's statement that he followed the regulation, the language of the regulation suggesting confidentiality of communications beyond the commander, as well as the absence of evidence in the record that Appellant was informed his communications would not be kept private, we will assume without deciding that Appellant's communications were confidential.

Exceptions to the Psychotherapist-Patient Privilege

We now turn to the issue of whether Appellant's statements to Dr. Budd fell within exceptions to the psychotherapist-patient privilege under M.R.E. 513(d)(4) and (6) and could properly be considered on sentencing.

Appellant provides what is essentially a public policy rationale for why his statements fall within the general privilege under M.R.E. 513(a) and not within the exceptions to the privilege. Quoting to Jaffee v. Redmond, 518 U.S. 1, 10-12 (1996), Appellant argues that "effective psychotherapy . . .depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." He contends that if the privilege is rejected here and his statements to Dr. Budd can be used as evidence against him, he will be punished for his candor, and other servicemembers facing similar circumstances in the future will not be forthright when communicating with mental health providers.

Appellant also argues that the exceptions to the privilege outlined in M.R.E. 513(d)(4) and (6) are ambiguous and that it is unclear how severe his conduct must be before he is considered a danger to "any person" or himself, or is seen to compromise the "accomplishment of a military mission." He asserts that a wide range of conduct could fall within the ambiguous contours of the exceptions, and the Government must resolve ambiguities by narrowly interpreting them. He characterizes any assertion that he is prone to violence as mere speculation, and he describes his conduct as falling outside the exceptions.

In Jaffee the Supreme Court noted that society should encourage an individual to seek assistance from a psychotherapist. 518 U.S. at 10-12; see also United States v. Rodriguez, 54 M.J. 156, 159 (C.A.A.F. 2000). Appellant may be correct that if statements made to a therapist can be admitted at a court-martial under one of the exceptions to the privilege outlined in M.R.E. 513(d), some servicemembers, knowing their statements may one day be used against them, may refrain from making frank disclosures during treatment. However, while M.R.E. 513 is based on Jaffee, the President, in promulgating M.R.E. 513, intended to adopt a rule that did not literally incorporate Jaffee, but instead "applies a more limited approach" to the psychotherapist-patient privilege. Rodriguez, 54 M.J. at 160. The exceptions were drafted to limit the privilege in order to balance the public policy goals stated in Jaffee with "the specialized society of the military and separate concerns that must be met to ensure military readiness and national security." Manual for Courts-Martial, United States, Analysis of the Military Rules of Evidence app. 22 at A22-44 (2005 ed.).

Appellant also asserts that the exceptions to the privilege are ambiguous and that their application to him is therefore unfair. In particular, Appellant argues that the language removing the privilege when the patient is a danger to "any person," or when "necessary to ensure the safety and security of

military personnel . . . or the accomplishment of a military mission," is so broad that a reasonable servicemember would not know what is or is not covered under the exceptions. Certainly, the M.R.E. text does not indicate each context in which the exceptions might apply. Whether the exceptions apply is necessarily a fact-specific determination for a military judge to consider with an accurate awareness of the facts underlying the dispute, just as hearsay determinations necessarily involve context. It is for this reason that the M.R.E. forego detailed analyses of their application in different factual scenarios, and it is for this same reason that a military judge's evidentiary determinations are reviewed for an abuse of discretion. In our view, M.R.E. 513(d)(4) and (6) provide adequate and fair notice, informed by case law, as to their potential applicability.

In this case, the military judge determined that Appellant's mental state posed a risk to the safety of others or himself or to the accomplishment of a military mission, and his decision that Appellant's statements were not protected by the privilege and were admissible on sentencing was not an abuse of discretion. Dr. Budd, a clinical psychologist with seventeen years of experience, wrote in his evaluation that Appellant's mental health posed a danger to others. Appellant's actions and his statements to Dr. Budd during treatment substantiated those findings. Appellant told Dr.

Budd that he was arrested once for fighting while on leave. Two days before meeting with Dr. Budd, Appellant chased three airmen with a fourteen inch knife while shouting racist slurs. The following day, Appellant reiterated those threats, telling a friend that "If that guy from last night came around again, I would f****** kill him." Appellant also communicated at that time that he would have cut the throat of his master sergeant the previous night if he had possessed a knife.

Appellant told Dr. Budd that he had received four letters of reprimand for alcohol use and that he continued to drink heavily several times a week. Dr. Budd was also informed that Appellant was under investigation for illegal drug use. In addition, Appellant reported feelings of constant and chronic hostility, and indicated he felt an inability to control his anger. Dr. Budd conducted personality testing that confirmed Appellant experienced intense anger and was likely to act upon his impulses. Although we may not at this point be able to determine every context in which M.R.E. 513(d)(4) and (6) might apply, we conclude with confidence that the two exceptions were implicated when Appellant made threats to kill persons while brandishing a fourteen-inch knife.

Based on this information, the military judge properly applied M.R.E. 513(d)(4) and (6) to

Appellant's communications, and he therefore did not abuse his discretion.

DECISION

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Appendix B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES
v.
Airman First Class MICHAEL P. JENKINS

United States Air Force

ACM 35699

16 August 2005

Sentence adjudged 23 July 2003 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Daryl E. Trawick (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Andrew S. Williams, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Samantha M. Brock (legal intern).

Before
MOODY, SMITH, and PETROW
Appellate Military Judges

OPINION OF THE COURT

PETROW, Judge:

We have examined the record of trial, the assignment of error, and the government's reply thereto. The appellant was convicted, pursuant to his pleas, of divers uses of cocaine and marijuana, assault, disorderly conduct, and communication of a threat, in violation of Articles 112a, 128, and 134, UCMJ, 10 U.S.C. §§ 912a, 928, 934. The appellant argues that the military judge improperly applied the exceptions to the psychotherapist-patient communications privilege in Mil. R. Evid. 513(d)(4) and (6), and thus, erred in permitting trial counsel to introduce the appellant's confidential communications to his psychotherapist, Lieutenant Colonel (Lt Col) Frank Budd. He bases this argument primarily on the observation that Lt Col Budd could only "speculate" on the danger that the appellant may have posed, and did not state that the appellant was a danger to any specific person.

According to the stipulation of fact submitted in the case, as well as the appellant's statements during the providency inquiry, on 7 May 2003, the appellant

and others confronted and harassed Airman First Class (A1C) Brandon Times. One person in the appeallant's group called A1C Times a "n*****." A1C Times left the area, but soon returned with two others with the intent of confronting his harassers. A1C Times encountered the appellant outside the base dormitory area. After exchanging words, the appellant chased A1C Times and his two companions with a 14-inch knife with a 9-inch blade. While chasing after them, the appellant threatened to kill them stating, "Y'all n****** are f****** with a crazy white boy tonight. I am going to kill y'all n****** tonight." The latter ran for safety, and soon after, reported the appellant's actions to the Security Forces. The appellant had consumed several beers and multiple shots of the liquor "Jagermeister" before the incident.

On 8 May 2003, the appellant stated to another airman, "If that guy from last night came around again, I would f****** kill him." Later in the day, the appellant stated to Staff Sergeant Avriel DuVerney, "[I]f I had a knife when she [referring to his First Sergeant] told me to walk home I would have cut that b*****'* throat." The appellant was angry that his First Sergeant made him walk home from the Security Forces Squadron building following the assault incident on 7 May 2003.

A military judge's decision on admission of evidence is reviewed on appeal for a clear abuse of

discretion. *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997). To reverse for an abuse of discretion, the military judge's decision must be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987). Mil. R. Evid. 513(a) provides:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

The rule also provides eight exceptions that the privilege does not extend to. The exceptions pertinent to this case are:

> (4) when a psychotherapist . . . believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

. . . .

> (6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission.

The Military Rules of Evidence have never specifically recognized a patient-doctor privilege. In fact, Mil. R. Evid. 501(d) declares the privilege inapplicable to courts-martial. However, in *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Supreme Court recognized a psychotherapist-patient privilege under Fed. R. Evid. 501. As suggested in the Drafter's Analysis, *Manual for Courts-Martial, United States (MCM)*, A22-38 (2002 ed.), this spurred the military to incorporate a psychotherapist-patient privilege that was compatible with "the specialized society of the military and separate concerns that must be met to ensure military readiness and national security." *MCM*, A22-44. Accordingly, the Military Rules of Evidence were amended in 1999 to include Mil. R. Evid. 513, creating a psychotherapist-patient communication privilege, along with the eight exceptions contained in Mil. R. Evid. 513(d). As clearly stated by our superior court, "In the absence of a constitutional or statutory requirement to the contrary, the decision as to whether, when, and to what degree *Jaffee* should apply in the military rests

with the President, not this Court." *United States v. Rodriguez*, 54 M.J. 156, 161 (C.A.A.F. 2000).

The appellant, notwithstanding the President's acknowledged sovereignty in this realm, seeks to create exceptions to the exception. The first of these would require a finding under Mil. R. Evid. 513(d)(4) that the government has established a requisite that the danger be to a *specific* person, rather than to *any* person as required. The major flaw in this argument is that the President elected to do otherwise, and faced with our superior court's cited observation in *Rodriguez*, it would be inappropriate for a military appellate tribunal to adopt the appellant's suggestion.

The appellant's remaining argument is that Lt Col Budd's belief that the appellant presented a danger to the community was merely "speculation." The government is permitted to present opinion evidence of rehabilitative potential to the court to aid in the determination of an appropriate sentence. Rule for Courts-Martial (R.C.M.) 1001(b)(5)(A). The opinion witness must "possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority." R.C.M. 1001(b)(5)(B). And, the opinion must "be based upon relevant information and knowledge possessed by the witness" and "relate to

the accused's personal circumstances." R.C.M. 1001(b)(5)(C).

Lt Col Budd, a clinical psychologist with 17 years experience in the field, had conducted a commander-directed mental health evaluation of the appellant for use in determining the appropriateness of pretrial confinement of the appellant. Over defense objection, Lt Col Budd testified during the sentencing portion of the trial that the likelihood that the appellant would commit further violence was relatively high. He concluded that extensive, prolonged psychiatric treatment would be necessary to address the appellant's personality issues. Lt Col Budd believed that the appellant's chances of rehabilitation were very poor.

Lt Col Budd's written evaluation of the appellant was also admitted into evidence over defense objection. In that evaluation, Lt Col Budd describes the results of two standardized mood scale tests administered by him to the appellant, one for general distress and the other specific for anger. He found that the appellant "endorsed significant distress." On the anger scale, "seven of the eight subscales were elevated to near or at the highest levels possible." The appellant scored extremely low on the scale measuring anger control. Lt Col Budd also observed, "Personality testing confirms member's intense anger and likelihood to act out his impulses." He concluded that the appellant be ordered into pretrial

confinement "due to his dangerousness to others." In addition, he believed that the appellant's "condition is not amenable to treatment in the military setting."

In *United States v. Williams*, 41 M.J. 134, 139 (C.M.A. 1994), our superior court upheld the admission of such expert opinion testimony for the purpose of assisting the sentencing authority in evaluating an accused's rehabilitative potential, providing there was a rational basis for the opinion. From the record in the instant case, it is clear that Lt Col Budd's opinion was based on the appellant's personal circumstances, and on relevant information and knowledge which he acquired from his testing of the appellant. Accordingly, his opinion was rationally based and helpful to the military judge in evaluating the appellant's rehabilitative potential. The admission of his testimony and written evaluation was thus proper under the requisites of R.C.M. 1001(b)(5) and *Williams*. His conclusion that the appellant posed a threat to others from a condition that would require extensive treatment not available in a military setting suggested the potential for the threat to be long-term rather than limited to the period of pretrial confinement. Accordingly, Lt Col Budd's testimony was an adequate basis for the military judge to conclude that the psychotherapist-patient privilege was vitiated due to the exceptions in Mil. R. Evid. 513(d)(4) and (6).

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator